IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ....

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

J. WARD DRISCOLL
25 South Bemiston Avenue
Clayton, Missouri 63105
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Come now the petitioners, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and, for their petition for writ of certiorari, state to the Court that:

(a) No opinion was delivered by the Court of Appeals for the Eight Circuit, upon its dismissal of petitioners' appeal for lack of jurisdiction. The order of dismissal is at p. A-47 in the appendix. The opinion of the District Court on June 10, 1971, denying petitioners' Motion to

Stay Proceedings in the District Court, pending the final adjudication of cause No. 52930 of the Circuit Court of Boone County, Missouri, and the District Court's opinion on June 23, 1971, denying a rehearing on the motion are contained in the appendix at pp. A 13-15 and pp. A 18-19 respectively.

(b) The jurisdiction of this Court is invoked to review an order of July 23, 1971, of the Court of Appeals for the Eighth Circuit, dismissing petitioners' appeal for lack of jurisdiction. The appeal to the Court of Appeals is pursuant to 28 U.S.C. 1292 (a)(1). The petition for writ of certiorari to this Court to review the order of dismissal of the Court of Appeals is pursuant to 28 U.S.C. 1254 (1).

The Court of Appeals order of July 23, 1971, called for its mandate to issue and said mandate so issued. On July 30, 1971, petitioners filed their Motion to Recall and Stay the Mandate, pending petitioners' prompt filing of this petition for writ of certiorari. On August 2, 1971, the Court of Appeals denied petitioners' Motion to Recall and Stay the Mandate.

(c) Petitioners believe this petition comes specifically within the considerations governing review on certiorari, as set forth in Supreme Court Rule 19, in the following ways:

(1) "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;"

Petitioners believe the order of the Eighth Circuit Court of Appeals on July 23, 1971, is in conflict with at least the Second, Fifth and Tenth Circuit Courts of Appeals, in that petitioners' appeal is pursuant to 28 U.S.C. 1292 (a)(1) and meets the requirements set forth in the decision of the Second Circuit in Standard Chlorine of Delaware, Inc. v. Leonard, 384 F2d

304 (1967), which quotes the U.S. Supreme Court's decision in Baltimore Contractors v. Bodinger, 348 U.S. 176, 99 L.Ed. 233, 75 S.Ct. 249, and concludes by saying:

> "And, we agree with the Fifth Circuit that the rule that has emerged from the many decisions is that 'An order staying or refusing to stay proceedings in the District Court is appealable under No. 1292 (a) (1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; **and** (B) the stay was sought to permit the prior determination of some **equitable** defense or counterclaim.' Jackson Brewing Co. v. Clarke, 303 F2d 844, 845 (5th Cir.), cert. denied 371 U.S. 891, 83 S.Ct. 190, 9 L.Ed. 124 (1962) (emphasis in original)."

The Tenth Circuit in Fred M. Hart v. Orion Insurance Co., 427 F2d 529 (1970) has followed Standard Chlorine of Delaware, Inc. v. Leonard.

(2) "Where the court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court."

The Supreme Court in Baltimore Contractors v. Bodinger, supra, interprets such a stay as an injunction within the meaning of 28 U.S.C. 1292 (a) (1) and, therefore, there would be jurisdiction on appeal, as set forth in (1) above.

As summarized in Standard Chlorine, this "Court (in Baltimore Contractors v. Bodinger) analogized such orders to those of a court of equity before the merger of law and equity. It reasoned that a stay of a law type action must be considered equivalent to an injunction staying litigation pending in another court; . . ."

Also, petitioners believe that the criteria for judging whether a particular stay is to be interpreted as an injunction appealable under 1292 (a) (1) should include those situations, where the course of action being pursued by the District Court, and which is sought to be stayed, involves needless friction with the state courts.

Chief Justice Vinson, in his opinion for the Court, in Alabama Public Service Co. v. Southern Ry. Co., 71 S.Ct. 762, has set forth the context in which federal and state court relations should be approached:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts' is convinced that the asserted federal relief cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts . . .
>
> "As this Court held in Great Lakes Dredge & Dock Co. v. Huffman: 'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public inter-

est when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

While the Supreme Court in said quotation is speaking specifically of not enjoining the state court, the Supreme Court is saying that if the federal court does not enjoin the state court, then the federal court will not proceed, but will stay itself and allow the state court to proceed. The situation in this case is more serious, for, as the District Court has found, respondent does not seek to stay the state court proceeding, but the District Court is nonetheless proceeding on the same subject that the state court is proceeding on.

In the circumstances of both the federal and state courts proceeding on the same subject, a request for the federal court to enjoin the state court would be appealable under 1292 (a) (1) as a request for an injunction. When in those circumstances, it is appropriate and proper that the issue be determined by the state court, then a request that the District Court be stayed must likewise be regarded as a request for an injunction under 1292 (a) (1).

Certainly, if any stay qualifies as an injunction, then a stay involving a matter having one of the highest claims to public interest should qualify. The developing law on contempt cases seems to recognize that it is essential for a Court, other than the Court involved, to pass on serious matters in that area; and appellants believe that the same holds true in this case, that it is essential for the U. S. Court of Appeals to pass on the matter, when the course of action being taken by the District Court does involve the serious matter of federal and state court relations.

This Court in Baltimore Contractors v. Bodinger, supra, reviewed the legislative history on interlocutory appeals as follows, l. c. 252:

> "The provision for interlocutory appeals was first introduced in 1891, when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat. 826, Section 7 of that Act allowed appeals from interlocutory orders in equity 'granting or continuing' injunctions, but for those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of § 1292 in its present form.
>
> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences."

This case involves the serious matter of federal and state court relations. If ever "an ounce of prevention is worth a pound of cure," then it is time for the federal courts to use that ounce of prevention and to stay the proceedings in the District Court, for the problem of straightening out the matter, after the District Court has proceeded to trial, becomes most formidable. It would contribute greatly to the administration of justice if this Court would rule on the applicable procedure to stay—that is, if this Court would state whether it prefers that review of the District Court's refusal to stay be by appeal or by direct application for a stay to the Court of Appeals and then to this Court; so that the procedure would be clear and so that a conflict between the federal and state courts could thereby be resolved at the earliest point in time.

The petitioners' grounds for stating that this case involves the serious matter of federal and state court relations are as follows:

> The suit in District Court seeks to obtain a deficiency judgment against the petitioners based upon a purported sale on December 14, 1970, by a trustee under a deed of trust on petitioners' real estate in Boone County, Missouri. The validity of that sale, at which the respondent, who is the holder of said deed of trust, purportedly bought said real estate, and at which the trustee conducting said sale was a member of the law firm representing respondent then and now, is presently being adjudicated in a proceeding in equity, brought by petitioners against respondent, said cause being No. 52930 of the Circuit Court of Boone County, Missouri.
>
> The District Court in an interlocutory order on June 10, 1971, denied petitioners' Motion to Stay Proceedings in the District Court, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated. The District Court found that respondent does not seek to stay the state court proceeding and the District Court is of the opinion that both the federal and state cases may properly proceed together.
>
> The petitioners contend that the situation of both the federal and state courts proceeding on the subject is not in the interest of justice and it has serious adverse effects on federal and state court relations and on the due process rights of petitioners, as set forth in the Fifth Amendment to the U. S. Constitution.

The petitioners' ground for stating that said order of June 10, 1971, is in violation of the Fifth Amendment to the U. S. Constitution is based on the following:

(1) Respondent's complaint seeks to impose on petitioners a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore, the basis of the federal court action, is the matter being determined by the state court.

(2) The District Court's findings mention that respondent does not seek to stay the state court action and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) The U. S. Supreme Court in England v. Louisiana State Board of Medical Examiners, 84 S.Ct. 461 (1964), has stated that the doctrine of abstention is a recognition of the state court's particular competency in such matters, to wit:

> "Abstention is a judge-fashioned vehicle for according deference to the 'respective' competence of the state and federal court systems.'
>
> "Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

(4) Therefore, to deny abstention under the circumstances is to impose on petitioners a determination of that issue by a tribunal recognized as not the most competent to decide that matter, and, therefore, is a denial to petitioners of the due process of law, guaranteed to them by the Fifth Amendment to the U. S. Constitution.

The U. S. Supreme Court's aforementioned statements in England v. Louisiana State Board of Medical Examiners also lead to the conclusion that further proceedings

by the District Court under the circumstances would be invalid, because of the aforementioned recognition "of the role of state courts as the final expositors of state law," for

(1) Respondent's complaint seeks to impose on petitioners a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore, the basis of the federal court action, is the matter being determined by the state court.

(2) The District Court's findings mention that respondent does not seek to stay the state court action and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) Not only is the state court recognized as the most competent to determine the matter, but it is also recognized as the "final expositor of state law," which means that its determination of the matter will govern. The federal court can take no action inconsistent with the state court's determination; and it can't know the state court's determination, until the state court has finally adjudicated the matter. Therefore, proceedings in the federal court must be stayed pending the final adjudication of the state court case.

The District Court mentioned in its ruling of June 10, 1971, that the federal court case was instituted prior to the state court case. This is true, but petitioners believe that respondent's actions subsequent to the filing of the federal court case are to be adjudged analogously to the U. S. Supreme Court's ruling in England v. Louisiana State Board of Medical Examiners as regards the transfer cases. In the transfer cases, when the federal court has transferred the parties in a federal court case to the state

court for a determination of a local or state issue, the U. S. Supreme Court in the England case held that if the parties, when transferred to the state court, proceed to "argue" their claims under the U. S. Constitution; then the parties shall be deemed to have "abandoned" the federal District Court.

In this case, respondent, after the filing of the federal suit seeking a deficiency judgment based on the purported trustee's sale on December 14, 1970, was unwilling to await the determination by the federal court of the consequences of that purported sale and proceeded to enter into a contract to sell said real property to another person, who resides in Boone County, Missouri. Immediately, upon learning of said contract, petitioners brought suit in equity against respondent and said other party in the Circuit Court of Boone County, Mo., to enjoin any consummation of that purported sale to said other party and to set aside the purported trustee's sale of December 14, 1970, before more purported transfers of said real property were made. Respondent entered into that litigation in said state court action and did not seek to remove it to federal court and; as the District Court has found, does not seek to stay the state court proceeding.

Therefore, respondent by its actions subsequent to its filing of the federal suit, has, analogous to the England case, "abandoned" its claim to having the federal District Court determine the matter of state law or respondent has neutralized its claim to federal jurisdiction based on diversity, and, under the circumstances, the District Court must abstain in the public interest to avoid needless friction with the state courts, and, failing to abstain on that basis, the District Court must abstain on the ground that further proceedings would be in violation of petitioners' due process rights under the Fifth Amendment to the U. S. Constitution, as detailed above.

(d) The petition for writ of certiorari is pursuant to 28 U.S.C. 1254(1), to wit:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:'
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

This petition seeks issuance of a writ of certiorari to review a denial for lack of jurisdiction of petitioner's appeal to the Court of Appeals from an interlocutory order of a District Court of the United States, which appeal was taken pursuant to 28 U.S.C. 1292(a)(1) to wit:

> "(a) The Courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

and particularly that part thereof that relates to refusing injunctions.

The denial of motion to stay proceedings in the District Court not only has serious adverse effects on federal and state court relations, but it is a denial to petitioners of the due process provisions of the Fifth Amendment to the U. S. Constitution, to wit:

> ". . . nor shall any person be deprived of life, liberty or property without due process of law;"

(e) A concise statement of the case containing the facts material to the consideration of the questions presented:

The suit in District Court seeks to obtain a deficiency judgment against the petitioners based upon a purported sale on December 14, 1970, by a trustee under a deed of trust on petitioners' real estate in Boone County, Missouri. The validity of that sale, at which the respondent, who is the holder of said deed of trust, purportedly bought said real estate, and at which the trustee conducting said sale was a member of the law firm representing respondent then and now, is presently being adjudicated in a proceeding in equity, brought by petitioners against respondent, said cause being No. 52930 of the Circuit Court of Boone County, Missouri.

The respondent, after the filing of its federal suit seeking a deficiency judgment based on the purported trustee's sale on December 14, 1970, was unwilling to await the determination by the federal court of the consequences of that purported sale and proceeded to enter into a contract to sell said real estate to another party, who resides in Boone County, Missouri. Immediately, upon learning of said contract, petitioners brought said suit in equity against respondent and said other party in the Circuit Court of Boone County, Missouri, to enjoin any consummation of that purported sale to said other party and to set aside the purported trustee's sale of December 14, 1970, before more purported transfers of said real property were made. Respondent entered into that litigation in said state court action and did not seek to remove it to federal court, and as the District Court has found, respondent does not seek to stay the state court proceeding.

The District Court, in an interlocutory order on June 10, 1971, denied petitioners' Motion to Stay Proceedings in the District Court, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated. The District Court found that respondent does not seek

to stay the state court proceeding and the District Court is of the opinion that both the state and federal cases may properly proceed together.

Petitioners, in a Motion for Rehearing of Motion to Stay Proceedings filed on June 21, 1971, stated to the Court in part that: ". . . the situation of both the federal and state courts proceeding on the subject is not in the interests of justice and it has serious adverse effects on federal-state relations and it is a violation of petitioners' rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

On June 23, 1971, the District Court denied the Motion for Rehearing, saying it contained nothing new, and on June 25, 1971, petitioners filed their Notice of Appeal to the Court of Appeals for the Eighth Circuit from the interlocutory order of June 10, 1971.

Respondent filed a Motion to Dismiss the appeal for lack of jurisdiction with the Court of Appeals. Petitioners filed a Response thereto. The Court of Appeals on July 23, 1971, granted the motion to dismiss. Petitioners have filed this petition for writ of certiorari to review said order of July 23, 1971, of the Court of Appeals.

The District Court's order, denying the stay of all proceedings pending the final adjudication of the state court action, is dated June 10, 1971, and contains leave for petitioners to assert in federal court any defenses or counterclaims presently asserted in the state court. Petitioners, in their Motion for Rehearing of Motion to Stay Proceedings filed on June 21, 1971, stated in part:

> "Said defendants wish to assert herein all the counterclaims and defenses presently asserted by them in . . . state court and believe their assertion is es-

> sential to a just adjudication of this case. Also, the defendants believe the situation of both the federal and state courts proceeding on the subject is not in the interests of justice and it has serious adverse effects on federal-state relations and it is a violation of defendants' rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

and petitioners proceeded to detail the reason for stating that said order was in violation of the Fifth Amendment to the U. S. Constitution.

On June 23, 1971, the District Court denied the motion for rehearing, saying it contained nothing new, and extended the time for amending the pleadings to include the state court defenses and counterclaims to June 30, 1971. On June 25, 1971, petitioners filed their Notice of Appeal to the Court of Appeals from the interlocutory order of June 10, 1971. On June 30, 1971, petitioners filed with the District Court a Motion to Stay While Appeal is Pending, together with amended pleadings incorporating their state court defenses and counterclaims. In that Motion to Stay While Appeal is Pending, petitioners stated that:

> "Defendants have filed their amended pleadings, as above set forth, together with the filing of this motion. Defendants state, however, that to require them to proceed further in this case, prior to the determination of their appeal, would have the effect of prejudging that appeal and of depriving them of said appeal without a hearing of it on the merits by the U. S. Court of Appeals."

Petitioners believe jurisdiction of the case was transferred from the District Court to the U. S. Court of Appeals for the Eighth Circuit upon petitioners' filing of

their Notice of Appeal on June 25, 1971. As Chief Justice Burger said in his State of the Federal Judiciary address to the American Bar Association in New York, New York, on July 5, 1971, and reprinted in vol. 91, No. 18, S. Ct. Reporter, p. 11 of yellow pages: "When that notice is filed the District Court loses jurisdiction . . ." Likewise, Rule 1b of the Rules of Appellate Procedure states that said rules shall not be construed to extend or limit the jurisdiction of the U.S. Courts of Appeals.

In light of the foregoing, and the Congressional intent in regard to appeals from interlocutory orders, as interpreted by the Supreme Court and quoted above, petitioners do not believe that Rule 8 of the Rules of Appellate Procedure is applicable to the appeal from the interlocutory order; however, the petitioners have attempted to conform thereto by asking the District Court to stay proceedings in the District Court while said appeal is pending, preparatory to asking the Court of Appeals to stay proceedings in the District Court while said appeal is pending, should the District Court refuse to do so.

The District Court did not rule on that Motion until after the Court of Appeals dismissed the appeal for lack of jurisdiction and ordered its mandate to issue. Upon receiving the mandate, the District Court ruled that the Motion to Stay While Appeal is Pending was now moot. On July 30, 1971, petitioners filed with the Court of Appeals for the Eighth Circuit a Motion to Recall and Stay Mandate, pending the prompt filing of this petition for writ of certiorari. On August 2, 1971, the Court of Appeals denied petitioners' Motion to Recall and Stay of Mandate.

The respondent, after filing its Motion to Dismiss for lack of jurisdiction in the Court of Appeals, later filed a Motion to Affirm. In their response to the first motion, petitioners mentioned that they would file a separate re-

sponse to the second motion; however, prior to the filing of that response, the Court of Appeals denied the Motion to Affirm, at the same time it was granting the Motion to Dismiss.

(f) Subsection (f) of Supreme Court Rule 23 (1) concerns review of state court judgments, and, therefore, is inapplicable to this requested review of the order of the U.S. Court of Appeals for the Eighth Circuit.

(g) The basis of respondent for federal jurisdiction in the court of first instance is diversity of citizenship, 28 U.S.C. 1332 (a) (1); however, attention is called to the last three paragraphs of (c) above re respondent's actions following the filing of its complaint in federal court.

(h) The defining of the proper roles of the federal and state courts is a continuing process of primary importance to the administration of justice in the United States. It is also essential to the preservation of our federalism. A comprehensive treatment of the subject is contained in the Supreme Court's decision in England v. Louisiana State Board of Medical Examiners, supra. Petitioners believe their position, as regards the respective roles of the federal and state courts, is fully in accord with that decision.

When a serious conflict arises between the federal and state courts, it is of equal importance that the procedure for resolving that conflict be clear.

The petitioners believe that this case involves a serious conflict between the federal and state courts, and, requested the District Court to stay all proceedings in the District Court, until the state court had completed its adjudication on the matter. The District Court refused to stay and the refusal to stay was appealed to the Court of Appeals for the Eighth Circuit.

Since petitioners met the requirements of Standard Chlorine of Delaware, Inc. v. Leonard, supra, to-wit, that they sought to stay a proceeding at law in the District Court, pending the prior determination of a proceeding in equity in the state court, petitioners followed the established procedure set forth in Standard Chlorine by appealing pursuant to Section 1292 (a) (1). This Court, and the Courts of Appeals for the Second, Fifth and Tenth Circuits have interpreted such a request for a stay as being a request for an injunction within the meaning of that section.

Apparently, the Eighth Circuit does not agree with those decisions, for it dismissed petitioners' appeal for lack of jurisdiction, but filed no opinion with the order of dismissal.

In Baltimore Contractors v. Bodinger, supra, the Supreme Court discussed the historical reasons for treating such a stay as an injunction and stated that any changes in such an interpretation should come from Congress. Congress has not sought to change that interpretation.

Any arguments for changing the interpretation due to the fusion of law and equity were dealt with in Baltimore Contractors, as mentioned above, and would be inapplicable anyway in this case, where the equity proceeding is in the state court and the law type proceeding in the federal court, in light of this Court's statements in England v. Louisiana State Board of Medical Examiners on the respective roles of the federal and state courts, as detailed in (c) above.

While the right of appeal seemed clear in such circumstances, it now becomes necessary to reaffirm or clarify it, in view of the Eighth Circuit's decision.

It may be possible for petitioners to seek a stay of proceedings in the District Court by making application to the

Court of Appeals and then to the Supreme Court, pursuant to 28 U.S.C. 1651. This is another reason why petitioners believe it is very important for the Supreme Court to rule on the applicable procedure. This situation of trying to determine whether the procedure for review of the District Court's refusal to stay should be pursuant to No. 1292 (a) (1) or No. 1651 seems similar to the situation prevailing on what is the proper procedure for review of the District Court's refusal to issue a writ of habeas corpus, whether the refusal of the writ should be appealed to the Court of Appeals and then to the Supreme Court or whether the writ should be sought from the Court of Appeals, and, if it refuses, then from the Supreme Court. The Supreme Court, to petitioners' knowledge, has stated that it regards the appeal procedure as being preferable to seeking the writ directly from the Court of Appeals and the Supreme Court. Petitioners believe the same would be true in this case, that the appeal procedure would be preferable, and petitioners believe it would contribute greatly to the administration of justice, if the Supreme Court would make known what it regards as the preferable procedure under the circumstances.

WHEREFORE, petitioners pray the Supreme Court to issue a writ of certiorari to the Court of Appeals for the Eighth Circuit to review its order of July 23, 1971, in cause No. 71-1366, dismissing petitioners' appeal for lack of jurisdiction.

J. WARD DRISCOLL
25 South Bemiston Avenue
Clayton, Missouri 63105
863-3387
Attorney for Petitioners